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PP

v.

HOE CHIN SOON

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HIGH COURT MALAYA, PULAU PINANG
CHEW SOO HO JC
[CRIMINIAL APPEAL NO: 41-63-2009]
29 SEPTEMBER 2009

C ***CUSTOMS AND EXCISE:*** *Seizure - Prohibited goods - Seizure of lewd VCD copies - Whether prosecution must prove prohibited goods imported into Malaysia - Magistrate court's failure to consider provision of s. 119 of the Customs Act 1967 - Whether an error of law - Whether burden of proof should be on the respondent - Non-proving of value of*
D *seized goods - Whether fatal to prosecution's case - Customs Act 1967, ss. 119, 135(1)(e), 135(1)(iii)*

The respondent was charged under s. 135(1)(e) punishable under s. 135(1)(iii) of the Customs Act 1967 for knowingly concerned in
E dealing with prohibited goods *ie*, 1630 copies of lewd VCD valued at RM7,850 where such goods was prohibited under the First Schedule of Customs (Prohibition of Import) Order 1998 with intent to evade any prohibition applicable to such goods. At the end of the prosecution's case, the respondent was acquitted and discharged.
F The magistrate's main ground was that the prosecution had failed to prove the vital element of the charge that the goods had been imported into Malaysia. The issue that arose was whether when the lewd VCD were found to be prohibited goods the importation of which was strictly prohibited, whether the prosecution should go
G further to prove that these prohibited goods were imported into Malaysia in a case of a dispute.

Held (allowing the appeal; setting aside order of acquittal and discharge):

H **(1)** The issue of the importation of goods seized in the instant case clearly came within the provision of s. 119 Customs Act. Once the respondent claimed trial to the charge, a dispute arose and the provision of s. 119 says that the burden of proof is on the respondent (*PP v. Fatimah*). The learned magistrate was vividly
I in error of law when she failed to consider the provision of s. 119 of the Act though this provision was categorically

invoked by the prosecution in its written submission. It was wrong for the magistrate to have found that the prosecution was still required to prove that the goods were imported into Malaysia when the burden of proof was shifted onto the respondent. (para 11)

(2) Another aspect of this case was the value of the seized 1,630 copies of VCD which appeared in the charge to be worth RM7,850 that the magistrate found to be not proved by the prosecution. However, the intent and purpose of quoting the value of the goods was to facilitate the calculation of the duties or penalties or for the purpose of the ultimate punishment of fine to be imposed by the court. The value of the goods seized herein was not the calculation of any unpaid import duty as in the fact of the case but more towards the punishment of fine ultimately. Hence, the non-proving of the value of the seized goods did not vitiate the charge and it was not fatal to the prosecution's case. (para 12)

[Respondent ordered to enter defence on the aforesaid amended charge before the same magistrate on a date to be fixed within one month from the date hereunder.]

Case(s) referred to:
Kee Kim Chooi & Ors v. PP [1952] 1 LNS 44 HC ***(refd)***
Lau Kieng Chung v. PP [1994] 3 CLJ 330 HC ***(refd)***
PP v. Fatimah [1960] 1 LNS 92 HC ***(refd)***
R v. Shivpuri [1986] 2 All ER 334 ***(refd)***

Legislation referred to:
Customs Act 1967, ss. 119, 135(1)(d), (e), (iii), (2)

For the appellant - Azamuddin Abd Aziz DPP
For the respondent - In person

Reported by Suhainah Wahiduddin

JUDGMENT

Chew Soo Ho JC:

[1] Respondent was charged under s. 135(1)(e) punishable under s. 135(1)(iii) of the Customs Act 1967 for knowingly concerned in dealing with prohibited goods ie, 1,630 copies of lewd VCD's valued at RM7,850 where such goods were prohibited under the First

Schedule of Customs (Prohibition of Import) Order 1998 (PU(A) 210/98) on 15 August 2002 at about 11.30am at 24 Jalan Arumugam Pillai, 14000 Bukit Mertajam with intent to evade any prohibition applicable to such goods. Initially respondent was charged for possession of the prohibited goods under s. 135(1)(d) but the charge was subsequently amended as per p. 14 of the record of appeal but the magistrate in her ground of judgment maintained the initial charge which is apparently an error. Nevertheless, in her grounds that followed, she has dealt with the offence which is the amended charge. In other words, she still had the correct charge in mind when she made out her grounds of judgment and therefore, it does not vitiate her findings and decision. At the end of the prosecution's case, respondent was acquitted and discharged. The magistrate's main ground is that the prosecution had failed to prove the vital element of the charge that the goods had been imported into Malaysia.

[2] The ingredients of the aforesaid charge as listed out by the magistrate are:

(1) The respondent had the knowledge;

(2) The respondent was concerned in dealing;

(3) The goods were prohibited; and

(4) The goods were imported.

[3] The facts of the case show that customs commissioner Mohamad Razey b Ariffin (SP3) together with three other colleagues raided premises No. 24 Jalan Arumugam Pillay Bukit Mertajam which was selling VCDs on 15 August 2002 at about 11.30am. Upon entry into the premises, SP3 saw a few persons and the respondent who was at the counter where money transaction took place. SP3 instructed all customers to leave the premises. When all customers had left, the respondent remained. Thereafter SP3 and his team conducted examination on the VCD's and found a total of 1,630 copies of lewd VCDs which were subsequently confirmed by (SP2), Mamat Ibrahim who is from Bahagian Penapisan Filem, Kementerian Hal Ehwal Dalam Negeri Pulau Pinang.

[4] The magistrate found that the VCDs were displayed in racks in the said premises and they were exposed. From these VCD's, it was found that they clearly showed the acts which were obscene in nature. Evidence also shows that these VCDs were played and

confirmed to contain obscenity. From the pictures exhs. P3(a) - (e), they also show that these VCDs were hung on the wall in a conspicuous place in the premises. On account of this evidence, the magistrate found as a fact that the respondent had the knowledge of those lewd VCDs. Not to forget, even if the magistrate did not so find, there is still the presumption under s. 135(2) of the Customs Act which provides that any prohibited goods shall be deemed to be prohibited goods to the knowledge of the defendant unless the contrary be proved by such defendant.

[5] The respondent was seen to be the person who attended to customers in transacting with money at a counter. By such act, was he "concerned in dealing with' as specified in the charge? The magistrate found the fact that the respondent was behind the counter in the premises which was a place of business showed that respondent was concerned in dealing with the VCD's therein. Clearly by the aforesaid act of the respondent of transacting money with the customers at that counter, it was undoubtedly an act of selling and buying of the goods ie, VCD's. In *R v. Shivpuri* [1986] 2 All ER 334 at p. 342, Lord Bridge said that the word "deal" meant to pass goods to some third party. An act of selling and buying certainly comes within the meaning of "deal".

[6] On the third ingredient that the goods are prohibited goods, under the Customs (Prohibition of Import) Order 1998 [PU(A) 210/98], the magistrate found that goods that are obscene are listed in the first schedule in the said Customs Order as prohibited goods, the importation of which is strictly prohibited. The respondent has submitted that this Customs Order was not produced and was therefore not proved. The magistrate has duly considered this argument and rejected it on ground that this Customs Order is law and there is no necessity to so exhibit the law. She is perfectly correct in her finding. Parties are deemed to know the law. Respondent is therefore deemed to know the said Customs Order which has clearly been stated in the charge. This should not be an issue. The importance of this Customs Order is to prove that obscene material is listed as prohibited goods.

[7] The main ground for acquitting the respondent and indeed the sole ground of this appeal is that the prosecution has failed to prove that the goods were imported into Malaysia. The issue is, when the lewd VCD's were found to be prohibited goods the importation of which is strictly prohibited, must the prosecution go

A further to prove that these prohibited goods were imported into Malaysia in case of a dispute? The answer to this question can be found in the case of *Kee Kim Chooi & Ors v. PP* [1952] 1 LNS 44 where Thomson J said:

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> As regards the question of whether the tobacco was uncustomed, the prosecution had to prove that it had been brought at sometimes from outside Malaya and that duty had not been paid upon it, and to do so they were entitled to invoke the assistance of s. 99 of the Customs Enactment which reads as follows:
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> > If in any prosecution in respect of any goods seized for non-payment of duties or for any other cause of forfeiture or for recovering of any penalty or penalties under the Enactment, any dispute shall arise as to whether the customs duties have been paid in respect of such goods or whether the same have been lawfully imported or lawfully landed, or
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> > concerning the place whence such goods were brought, then and in every such case the proof thereof shall be on the defendant in such prosecution.
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> That section clearly applied for the prosecution was one for
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> penalties under the Enactment and when the appellants claimed trial, as they did, the effect of their doing so was to put in dispute every material allegation in the charges against them including the allegations that the tobacco had been brought from outside Malaya, and that duty had not been paid on it. The effect of s. 99, then, was that the proof of their sides of these disputes was upon the
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> appellants, that is to say, they had to satisfy the court either that the tobacco had not been brought from outside Malaya or that the proper duty had been paid upon it.

[8] In *Lau Kieng Chung v. PP* [1994] 3 CLJ 330, His Lordship

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Steve LK Shim J (as he then was) explained succinctly the above citation from Thomson J as follows:

> From the excerpt above, it would appear that the prosecution needs to establish two conditions, namely, that the goods were imported and that duties thereon had not been paid. However, to do this, the
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> prosecution could invoke the assistance of s. 99 of the Customs Enactment which is substantially in *pari materia* with the present s. 119 of the Customs Act which has the effect of shifting the burden of proof onto the accused. It should be noted that s. 119 can be invoked only as regards matters of dispute specified therein. It does not raise any presumption but merely shifts the burden of
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proving the matters specified therein. The obligation of the accused under s. 115 of the Customs Ordinance 1952, the predecessor of s. 119, was described by Hepworth J in *PP v. Fatimah* [1960] 1 LNS 92, thus:

> No presumption arises under s. 115 of the Ordinance. When a person is charged and claims trial a dispute arises. Once a dispute has arisen s. 115 says the burden of proof is on the defendant. The defendant may discharge this onus by producing a receipt for the duty or he may know that the duty has been paid and, although unable to produce the receipt, may be able to prove it (see the example of the bottle of whisky in para 4 of the judgment in Good J in *PP v. Tay Yew Lia*[1957] 1 LNS 88)

[9] The matter in dispute in the instant appeal is whether the offensive goods were imported into Malaysia. Ostensibly, as this is an ingredient of the charge, the prosecution ought to prove it but the prosecution is invoking the provision of s. 119 of the Customs Act to shift the burden onto the respondent. This is clearly stated in the prosecution's written submission in the court below as can be seen in pp. 67 and 68 of the Appeal Record.

[10] Section 119 Customs Act 1967 provides:

> If in any prosecution in respect of any goods seized for non-payment of duties or for any other cause of forfeiture or for the recovery of any penalty or penalties under this Act, any dispute arises whether the customs duties have been paid in respect of such goods, or whether the same have been lawfully imported or exported or lawfully landed or loaded, or concerning the place whence such goods were brought or where such goods were loaded, or whether anything is exempt from duty under section 14 then and in every such case the burden of proof thereof shall be on the defendant in such prosecution.

[11] The issue of the importation of goods seized in the instant case clearly comes within the provision of s. 119 of the Customs Act. As stated in *PP v. Fatimah (supra)*, once the respondent claimed trial to the charge, a dispute arose and the provision of s. 119 says that the burden of proof is on the respondent. The prosecution in its submission has invoked this provision to shift the burden of proof to the respondent. The learned magistrate is vividly in error of law when she failed to consider at all the provision of s. 119 of the Act though this provision was categorically invoked by the prosecution in its written submission and it is wrong for the magistrate to have found that the prosecution is still required to prove that the goods were imported into Malaysia when the burden

of proof is shifted onto the respondent. This burden of proof on the respondent is a matter of law and it is obligatory on the court to invoke it when such a dispute as to the issue of importation of the goods etc. as provided in s. 119 arises. In a case of such nature, once the prosecution has proved that the goods seized are prohibited goods within the schedule of the aforesaid Customs Order and the import of which is prohibited, it suffices to attract the provision of s. 119 of the Act as the issue of dispute of import or export, *inter alia*, is within the confine of this section. Section 119 will therefore apply to shift the burden onto the respondent to prove that the seized goods were not imported. When s. 119 is invoked, the prosecution is relieved of having to prove that the seized goods were imported. On this clear error of law on the part of the magistrate, this appeal ought to be allowed.

[12] Another aspect of this case is the value of the seized 1,630 copies of VCDs which appears in the charge to be worth RM7,850 that the magistrate found to be not proved by the prosecution. There is indeed no evidence how the prosecution had derived at that figure. However, the intent and purpose of quoting the value of the goods is to facilitate the calculation of the duties or penalties or for the purpose of the ultimate punishment of fine to be imposed by the court, for example, for an offence under s. 135(1) involving prohibited goods, s. 135(1)(iii) provides in para, (aa) that the offender to be liable for the first offence to a fine of not less than ten times the value of the goods or fifty thousand ringgit whichever is the lesser amount and not more than 20 times the value of the goods or one hundred thousand ringgit, whichever is the greater amount, or to imprisonment for a term not exceeding three years or to both. The mode of fine basing on the value of the goods is provided in most of the punishments under the Act. Hence, the value of the goods is important for that purpose. Be that as it may, for offences punishable under s. 135(1)(iii) in cases where the value is unascertainable, the proviso to s. 135(1)(iii) thereto has catered to cover the position. The proviso provides that where the value of the goods cannot be ascertained, the penalty may amount to a fine of not exceeding five hundred thousand ringgit or to imprisonment for a term not exceeding five years or to both. By this proviso which although uses the words "cannot be ascertained", I am of the view that it will include cases where the value of the goods is uncertain or unknown or as in this case where the value though stated or specified but has not been proved. For all intent and

purposes, the value of the goods seized herein this case is not the calculation of any unpaid import duty as in the fact of the case but more towards the punishment of fine ultimately. Hence, the non-proving of the value of the seized goods does not vitiate the charge and it is not fatal to the prosecution's case as the law itself has provided the provision to cater for such situation.

[13] For the above reasons and in particular when the learned magistrate has erred in law, the error of laws must be rectified.

[14] The appeal is therefore allowed. The order of acquittal and discharge is set aside. Respondent is ordered to enter his defence on the aforesaid amended charge before the same magistrate on a date to be fixed within one month from the date hereunder since this is an outstanding case where the incident took place in 2002.